



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

Detective Christopher Jones :

Tax Registry No. 904220 :

Military and Extended Leave Desk :

FINAL

ORDER

OF

DISMISSAL
-----X

Detective Christopher Jones, Tax Registry No. 904220, Shield No. 7678, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 86365/10, as set forth on form P.D. 468-121, dated March 22, 2010, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Christopher Jones from the Police Service of the City of New York.


RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On January 17, 2012 @0001HRS.

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

July 18, 2011

-----X
In the Matter of the Charges and Specifications : Case No. 86365/10

- against - :

Detective Christopher Jones :

Tax Registry No. 904220 :

Military and Extended Leave Desk :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable John Grappone
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Daniel Maurer, Esq. and Joanne Watters, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: James Moschella
225 Broadway, 32nd Floor
New York, New York 10007

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

DETECTIVE CHRISTOPHER JONES

The above-named member of the Department appeared before me on May 9, 2011, May 10, 2011, May 18, 2011 and June 1, 2011 charged with the following:

1. Said Detective Christopher Jones, assigned to the Organized Crime Investigations Division, on or about and between December 9, 2009 and March 9, 2010, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Detective, without authority or police necessity, did possess a controlled substance, to wit, cocaine.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED
CONDUCT
GENERAL REGULATIONS

2. Said Detective Christopher Jones, while assigned to the Organized Crime Investigations Division, on or about and between December 9, 2009 and March 9, 2010, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Detective, without authority or police necessity, did ingest a controlled substance, to wit, cocaine.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED
CONDUCT
GENERAL REGULATIONS

The Department was represented by Daniel Maurer, Esq. and Joanne Watters, Esq., Department Advocate's Office, and Respondent was represented by James Moschella, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Police Officer Markland Clarke, Lieutenant Erin Hughes, and Doctor Ruby Ghaffar as witnesses.

Police Officer Markland Clarke

Clarke, a 12-year member of the Department, is currently assigned to the Medical Division's Drug Screening Unit. He completed a one-week certification course given by the Psychomedics Corporation (Psychomedics) on the subject of hair collection, and he has collected over 7,000 hair samples during the course of his six years at the Drug Screening Unit. On March 9, 2010, the Respondent was called in for a random drug test, which means that there was no suspicion at the time that the Respondent was taking drugs. Clarke testified that although he does not have an independent recollection of the Respondent, the paperwork indicates that he was, in fact, the person responsible for collecting the Respondent's samples on that day. He explained that as with all members of the service who are tested for drugs, the Respondent filled out a Drug Screening Questionnaire, on which he indicated any prescription medications he had taken within the last three months. The form indicates that the Respondent was assigned the unique identification number 5-137-10-XNH. The Respondent's fingerprint appears on the form, and both Clarke and the Respondent signed at the bottom. In addition, for each of the Respondent's samples, Clarke prepared a Custody and Control Form. This form also contained the Respondent's identification number and was signed by both Clarke and the Respondent. [Department's Exhibit (DX) 1 consists of copies of the Respondent's Drug

Screening Questionnaire and Custody and Control Form, dated March 9, 2010. On the Drug Screening Questionnaire, the Respondent indicated that within the last three months he had taken [REDACTED]. On the Custody and Control Form, the Respondent signed under a donor certification stating, "I certify that I am the test subject, that the sample contained in the envelope is my sample, that it was cut close to the skin, and I witnessed the sample collector seal the sample in the envelope."]

Clarke took three samples from the Respondent. The samples were collected in the Drug Screening Unit's "cutting room," which Clarke described as "the cleanest room in the NYPD." He explained that the room contains two tables, which are sanitized with alcohol and covered with fresh paper before each new donor. Clarke could not recall if anybody else was in the room with them when he collected the Respondent's samples. Each sample was taken from a different part of the Respondent's head and cut close to the scalp. The Respondent was seated during the collection, and Clarke stood directly over him. Each sample was packaged separately in aluminum foil and then placed in a security envelope, which was sealed. Clarke initialed the seal, and the Respondent's signature and identification number appear on the envelope. Clarke would have worn gloves throughout the collection process.

Two of the Respondent's samples were sent to Psychemedics for testing. (DX 3 is a copy of the Laboratory Data Package for the two samples that were sent to Psychemedics. The results indicate that the samples tested positive for cocaine.) The Respondent's third sample was secured by the Sick Desk supervisor for testing at an independent laboratory in the event that the first two samples came back with positive

results. Clarke confirmed that the testing process he has described is the standard process that he employs whenever he takes hair samples. The Respondent's samples, which came back positive for cocaine, were the only positive samples collected on March 9, 2010.

On cross-examination, Clarke testified that in addition to the hair samples, he collected a urine sample from the Respondent on that day. The urine sample was tested for steroids, but Clarke did not know if it was also tested for other drugs. The sample, which was collected before the hair samples, came back with a negative result.

[Respondent's Exhibit (RX) A is a copy of the testing packet for the urine test. It consists of a second Drug Screening Questionnaire, a Custody and Control Form, and a copy of the test results. The results indicate that the Respondent's urine sample came back negative for many chemicals, including the cocaine metabolites.]

Sometimes as many as 15 members of the service a day report to Clarke's unit to get tested, and the Respondent was not the first person from whom Clarke collected samples that day. Clarke confirmed that although he recognizes the Respondent, he cannot specifically recall the circumstances of his actual collection. On average, the collection process takes 33 or 34 minutes. He did not recall fumbling with samples and spilling urine while he collected the Respondent's sample. He did not recall engaging in small talk with the Respondent, but it is possible that they had a conversation. He did not recall ever taking calls on his personal cell phone while collecting samples.

Clarke testified that he personally cleans the cutting room all the time. He primarily cleans the tables and takes out the garbage. He sometimes also cleans the floor. The janitor, who has access to the room, also cleans the floor sometimes. He reiterated

that the room has two tables, so it was possible that another member of the service was donating samples at the same time as the Respondent. Because the Respondent was facing away during the collection process, he did not actually see where Clarke was cutting the hair from.

On redirect examination, Clarke testified that he uses two hands to take hair samples. One hand holds the scissors, and the other hand holds the hair. After the Respondent's samples were collected, Clarke would have placed them in a plastic bag and dropped them in a security locker. The Respondent would have watched him do this. Clarke had no prior contact with the Respondent.

On recross-examination, Clarke confirmed that a donor acting very nervous during the collection process is something that would stand out in his mind. He did not recall the Respondent acting nervous or concerned.

Lieutenant Erin Hughes

Hughes, an 11-and-a-half-year member of the Department currently assigned to the 5 Precinct, was assigned to the Medical Division's Drug Screening Unit in March 2010. She explained that a donor's third sample is stored in a locked cabinet at the Sick Desk. When Psychemedics reports positive results, the third sample is removed from the locker and locked in a safe in the administrative office. Upon written request, the third sample will be sent for independent testing at any state-certified laboratory that the member chooses.

The Respondent's two samples that were sent to Psychemedics came back with positive results. They were the only samples that tested positive from March 9, 2010.

Hughes met with the Respondent at the Medical Division on July 7, 2010. She verified his identification and had him confirm that it was his signature and identification number on the drug screening paperwork. With the Respondent watching, she retrieved his third sample. At the Respondent's request, it was sent to Quest Diagnostics (Quest) for testing. Like the test of the first two hair samples, this test came back with positive results. (DX 2 is a copy of the Custody and Control Form for the third sample, signed by Hughes and dated on July 7, 2010. DX 4 is a copy of the Laboratory Report for the hair sample that was sent to Quest. The results indicate that the sample tested positive for cocaine.)

On cross-examination, Hughes testified that she was not present when the Respondent's samples were collected. She confirmed that many times when a member of the service tests positive for drugs, he does not bother to have his third sample sent out for testing. Members who opt to have their third samples tested never actually take possession of the samples. Although the Respondent requested that his third sample be tested at a Quest facility in Las Vegas, it was sent to a Quest facility in Kansas. Hughes explained that the Las Vegas facility was no longer doing testing.

Doctor Ruby Ghaffar

Ghaffar has been employed as the Senior Scientist at Psychomedics for a year. She serves as a certifying scientist and document custodian for the company. She also oversees the screening department. Psychomedics is licensed by the state of New York and has received clearance by the Food and Drug Administration. It has been performing

hair tests since 1987. Based on her credentials, Ghaffar was deemed an expert witness in the field of toxicology and hair analysis.¹

Ghaffar explained that an ingested drug enters the bloodstream, which feeds hair follicles. The drug thereby gets trapped inside the hair as it grows. Since hair grows at a predictable rate of a half-inch or 1.3 centimeters per month, hair acts as a timeline as to when the drug was ingested. In the current case, the Respondent's hair samples represented approximately two months of growth.²

For each member of the service being tested, Psychemedics receives two hair samples. Each sample envelope is inspected to ensure that the seals are still intact. While one sample is placed in storage, eight milligrams of hair from the other sample are dissolved in a test tube and analyzed by Radioimmunoassay, an initial screening test. In the current case, the Respondent's sample came back from the initial screening test with a positive result for cocaine. A second portion of the same sample was, therefore, cut and put through an extensive wash procedure. This wash procedure, which lasted three hours and 45 minutes, would have removed external contamination on the hair. After the wash, the hair was analyzed by Mass Spectrometry (MS), which is the technology used to confirm positive results. Ghaffar described MS as "an exact science of identification—it's basically the molecular fragmentation of a drug. And by breaking up a drug into

¹ Ghaffar testified that she received a Bachelor of Arts in sociology and biology from the University of Virginia. She went on to receive a basic health sciences certificate in physiology from the Virginia Commonwealth University School of Medicine, followed by a PhD in pharmacology and toxicology. She was previously employed as Chief Forensic Toxicologist and lab manager for the Delaware Chief Medical Examiner's Office. She has written articles on brain research for the European Journal of Pharmacology and has also been published in a quarterly newsletter put out by the Society of Forensic Toxicologists. She is a member of the Society of Forensic Toxicologists, the American Academy of Forensic Sciences, the Society of Hair Testing, the American Chemical Society, and the American Society for Testing Materials International. She has offered expert testimony in courts in Delaware, Kansas, and Wisconsin. In Wisconsin, her testimony was specifically about workplace hair testing.

² Ghaffar testified that while the Respondent's hair samples provided a 60-day window of possible drug ingestion, urinalysis provides a look-back window of just 48 to 72 hours.

particular fragments, you are able to identify the components that make up a drug, like a molecular fingerprint.” For cocaine cases, Psychemedics uses a highly sensitive device called a liquid chromatography mass spectrometer. If MS analysis comes back with a positive result, the donor’s second sample will be brought out of storage for another round of extensive washing and MS analysis. Only when both samples from a donor have positive MS results at or above a cutoff level of 5 nanograms of cocaine per ten milligrams of hair (5ng/10mg) does Psychemedics report the results to the Department.

For each donor, Psychemedics produces a Laboratory Data Package. This package details the chain of custody with respect to the hair samples. It documents who touched the samples and everything that was done to them throughout the testing process. It also details the results of the tests conducted. The Laboratory Data Package in the Respondent’s case was prepared by Doctor Thomas Cairns. Upon review of the package, Ghaffar testified that she saw no breaks in the chain of custody. She went on to testify that the Respondent’s first sample tested positive for cocaine at a level of 23.5ng/10mg, which is approximately four times higher than the cutoff level used by the Department. The sample also tested positive for cocaine metabolites, benzoylecgonine (BE), cocaethylene (CE). Ghaffar explained that metabolites are the byproducts left in the body after a drug has passed through the system, and CE is formed only when cocaine and ethanol are ingested together. In the Respondent’s first sample, BE was present at a level of 4.3ng/10mg and CE was present at a level of 2.1 ng/10mg. (The cutoff level for BE and CE is .5ng/10mg.) The test on the Respondent’s second sample indicated the presence of cocaine at a concentration of 30.1ng/10mg, BE at a concentration of 6.9ng/10mg, and CE at a concentration of 2.7ng/10mg. Ghaffar called the two test results

statistically similar. According to Ghaffar, no substance other than cocaine, either by itself or taken in combination with something else, could lead the machinery to these results. Ghaffar stated that the Respondent's test results indicated multiple ingestions of cocaine. While somebody who has taken [REDACTED] might test positive for opiates, [REDACTED] would not result in a positive test for cocaine. Similarly, ingestion of [REDACTED] would not result in a positive test for cocaine. [DX 3 is the Laboratory Data Package for the Respondent. His subject identification number (5-137-10XHN) appears on the cover sheet.]

Ghaffar later learned that the Respondent had the Department send his third hair sample to Quest for testing. She had the opportunity to review the Quest results (DX 4). The third sample came back with a reading of cocaine at a level of 19.7ng/10mg, BE at a level of 6.9ng/10mg, and CE at a level of 1.4ng/10mg.³ Ghaffar called these results statistically similar to the Psychemedics results.

Ghaffar also reviewed the test results for a fourth hair sample that the Respondent sent himself for testing at Quest. Ghaffar explained that this fourth test was run by Quest as a pre-employment test, but it should have been considered a follow-up test instead since its purpose was to reconfirm the three previous positive tests. The test came back with negative results, but Ghaffar explained that the negative results do not necessarily indicate that there was no drug present in the sample since pre-employment tests (unlike follow-up tests) take cutoff levels into consideration. Thus, there may have been drugs present, but just not at a concentration above the cutoff level. (RX B is a copy of the test results for the fourth hair test. The sample collection date was April 30, 2010. There is

³ The results for the Quest test were reported in picograms instead of nanograms, but Ghaffar converted the measurements to nanograms for the sake of consistency.

no scientific data packet attached, so there is no record of the length of the sample collected that day.)

On cross-examination, Ghaffar testified that neither she nor anybody else in her laboratory played any part in the collection of the Respondent's samples. The Department shipped the samples from New York to the Psychomedics laboratory in California. Numerous laboratory workers were responsible for the intake and analysis of the samples. Although the assessorers (or intakers) are responsible for ten samples at any given time, each sample is opened and weighed separately. Ghaffar is not always present to witness this process, and she did not personally handle the samples in this case. She was not the certifying scientist for the Respondent's tests. The laboratory conducts approximately 1,000 tests a day.

Ghaffar confirmed that because the length of the Respondent's hair samples represented approximately two months of growth, the test results indicated cocaine ingestion at some point after January 9, 2010. As for the test conducted on the Respondent's urine, the fact that no drug metabolites were found indicated that he did not ingest cocaine during the two or three days prior to sample collection. Based on the test results Ghaffar was, thus, able to conclude that the Respondent ingested cocaine on multiple occasions between January 9 and March 6. She explained that a single episode of ingestion would not have brought the concentration of cocaine in the Respondent's hair above the cutoff level.

Ghaffar confirmed that Quest is a reliable diagnostic facility, and she had no reason to doubt the integrity of the report that Quest issued with regard to the fourth,

independent sample submitted by the Respondent. For that test, Quest used a cutoff level of 3ng/10mg, which is lower than the cutoff level used at Psychemedics.

On redirect examination, Ghaffar confirmed that even if the Respondent had used one hundred percent pure cocaine, a single occasion of ingestion would not have resulted in the concentrations Psychemedics found in his samples. Similarly, while cocaine is sometimes used as an anesthetic during surgical procedures of the face, a single incident of pharmaceutical cocaine would not have led to the Respondent's test results. Ghaffar was unaware of cocaine being used for pharmaceutical purposes on more than one occasion. She confirmed that since six weeks had lapsed between the date the Respondent's first three hair samples were collected and the date his fourth sample was collected, the fourth sample could have tested negative simply because the Respondent had gotten a haircut and abstained from cocaine use during that period.

On recross-examination, Ghaffar confirmed that since hair grows approximately a half-inch per month, the sample collected on April 30, 2010 would have captured drug use going back to late January had it been an inch-and-a-half long. And it would have captured drug use going back to December 2009 had it been two inches long. Had the fourth hair sample reflected the same time period as the first three samples, the use of a cutoff level would have been insignificant since drugs do not dissipate within a given segment of hair. Upon review of the results for the fourth sample, Ghaffar conceded that there is no indication on the results page that the test was categorized as a pre-employment test. In fact, on both the results page and the Custody and Control Form for the fourth sample, the reason for the test is listed as "Independent" and not "Pre-Employment."

On continued redirect examination, Ghaffar confirmed that there was no way to know whether the fourth hair sample reflected the same time period as the first three samples. Quest and Psychemedics do not employ the same method of “hair digestion.” Psychemedics uses a more efficient method, which can extract more of a drug from a piece of hair. The Respondent’s fourth sample was collected at a facility called Partners in Safety Incorporated. When the tests were completed, Partners in Safety received a copy of the results from Quest. Ghaffar explained that it was from the second page of the results (a sort of results summary page) that Ghaffar got the idea that the test had been categorized as pre-employment.⁴ She reiterated that since Quest used a cutoff level, it will never be known whether cocaine was present at a level below the threshold of 3ng/10mg.

On continued recross-examination, Ghaffar confirmed that like Psychemedics, Quest uses MS technology for its testing.

The Respondent’s Case

The Respondent called Sergeant Bronthie Brereton and Doctor Fred Stern as witnesses and testified in his own behalf.

Sergeant Bronthie Brereton

Brereton, a 20-year member of the Department currently assigned to the Internal Affairs Bureau, was assigned to investigate the Respondent’s drug test failure. As part of his investigation, he reviewed the Respondent’s telephone records. He reviewed both home and cell phone accounts for the period between November 2009 and April 2010.

⁴ This page does, in fact, indicate that the test type was “pre-employment.”

Brereton testified that he did not find anything unusual in the telephone records, which did not corroborate in any way that the Respondent was associating with drug dealers or known criminals. Similarly, there was nothing in the telephone records indicative of somebody involved in the possession or ingestion of cocaine. Like the telephone records, a review of the Respondent's sick and disciplinary records revealed nothing to indicate somebody using cocaine on multiple occasions. Brereton explained that sometimes a person going sick a lot could be a sign of drug use.

On cross-examination, Brereton testified that in his review of the telephone records, he concentrated his investigation on the calls that the Respondent made between the sample collection date (March 9) and the date that he was notified of the test results (March 18). He did not go back to the numbers that were called three months earlier. Brereton did not know what the Respondent was doing 24 hours a day.

On redirect examination, Brereton confirmed that the Respondent did not take much time off from work. The investigation did not reveal that the Respondent would have had contact with narcotics while at work.

On recross-examination, Brereton confirmed that he never requested LUDS⁵ and tolls from the Respondent's wife, girlfriend, relatives, or colleagues.

The Respondent

The Respondent, an 18-year member of the Department, is currently assigned to the Military and Extended Leave Desk. Prior to failing his drug test, he was assigned to the Joint Organized Crime Task Force, which consisted of members from both this Department and the Federal Bureau of Investigations. As a member of that unit, he held

⁵ Local usage details (phone records).

federal top-secret clearance. The Respondent testified that he has never possessed or intentionally ingested cocaine. During the course of his career he has taken eight to ten random drug tests, and he never before been the subject of Department charges.

On the morning of September 11, 2001, the Respondent was among the first members of the service to respond to the site of the World Trade Center after the terrorist attacks. He stayed involved at the scene throughout the rescue and recovery process. As a result of his work there, he developed what his doctor calls the "World Trade Center cough." He explained that what started out as a nagging cough in April 2002 eventually led to a debilitating, painful hernia. Doctors at Mount Sinai Hospital's World Trade Center Monitoring Program have diagnosed him with [REDACTED]

[REDACTED]. As recently as a month ago, he was hospitalized for [REDACTED]. He takes [REDACTED] [REDACTED] and there are periods that he is on as many as [REDACTED] [REDACTED] at the same time. (RX C contains a photograph that the Respondent took of his medicine cabinet. He stated that it was a fair and accurate representation of the medications he was taking around the time of his drug test. RX C also contains a list of the prescription medications that the Respondent received from the CVS pharmacy between May 31, 2009 and March 30, 2010. During that period, the Respondent filled prescriptions for [REDACTED]

The Respondent testified that his cough started getting worse in October 2009, and he started seeing an ear-nose-throat specialist the following month. He had appointments with the specialist, Doctor [REDACTED], in November and December of

2009 and January and March of 2010. [REDACTED] did several procedures to the inside of the Respondent's nose and throat. During that period, the Respondent was also treated with [REDACTED]. Shortly before the drug test (in late February or early March 2010), he went out on sick leave for a period of five to seven days. As a result of his medical condition, the Respondent filed for three-quarters disability retirement. He has since signed a waiver, tabling the matter until the conclusion of this adjudication.

On March 9, 2010, the Respondent was notified to report to the Medical Division for drug testing. He did not make any attempt to avoid the testing and arrived at the Medical Division at approximately 2:00 p.m. Upon his arrival, there were six or seven people walking around the area freely. The Respondent spent approximately an hour and 15 minutes filling out paperwork and drinking water. Clarke then escorted the Respondent into the bathroom. The Respondent described Clarke as being distracted at the time. Clarke had his cell phone earpiece inside his ear and was having a loud cell phone conversation while the Respondent urinated into the sample collection cup. When the Respondent presented Clarke with the cup, Clarke accidentally spilled urine onto the table. Clarke explained to the Respondent that he owned restaurants, the restaurants were having problems, and this is what he was talking about on the telephone.⁶

Clarke subsequently brought the Respondent into another room to have his hair samples collected. The Respondent described this room as unclean and grimy. He sat at a table that had Band-Aids, pens, paper, and highlighters on it. He sat with his back to Clarke. At one point, somebody else came into the room. Clarke continued to talk on his

⁶ Clarke confirmed in his testimony that he engages in off-duty employment in the restaurant industry.

cell phone throughout the collection process. Before the Respondent knew it, Clarke informed him that the collection was complete, and Clarke showed him hair that looked like it was stuck to a piece of Scotch tape. Clarke sealed the hair in an envelope, and the Respondent initialed it. The Respondent testified that he never actually saw or felt Clarke cut his hair. He explained that he signed or initialed any paperwork that he was given anyway because he had never had a problem with drug testing before, and he believed that he had nothing to worry about.

On the day that the Respondent was notified of the test results, he was suspended from duty. A month later, he was placed on suspended with pay status. At that point, he was able to afford a fourth, independent drug test on his hair. According to an internet search, a facility called Partners in Safety was the sample collection site closest to his home. He had never before been to that location, nor did he know anybody who worked there. He went there on April 30, 2010. When the nurse asked him what the test was for, he told her that it was an "independent test." Because "independent test" was not an option on the paperwork that he prepared, however, he may have indicated "pre-employment test" on a form. He was unaware of any distinction between independent tests, pre-employment tests, or confirmatory tests.

The nurse brought the Respondent into a very clean examination room and collected three hair samples from him. The nurse placed each sample in a packet, which the Respondent signed. The samples were sent to Quest. The tests came back with negative results, and the laboratory sent the Respondent the results documentation, which consisted of just three pages (previously submitted as RX A). The laboratory explained to the Respondent that more comprehensive litigation packages are prepared only in cases

of positive results. The Respondent testified that he did not get a haircut or change his hair in any manner between March 9, 2010 and April 30, 2010.

On cross-examination, the Respondent testified that none of the medications that he received from the CVS pharmacy between May 31, 2009 and March 30, 2010 contained cocaine. To his knowledge, no cocaine was ever administered to him by Cohen. He derived the term "independent test" from talking to his attorney and his union delegate.

Doctor Fred Stern

Stern has been an internist at Montefiore Hospital since 1979 and has been the Respondent's primary care physician since 2006. Approximately a year after he started seeing the Respondent, the Respondent's health began to deteriorate. Since late 2007, the Respondent has suffered with chronic [REDACTED] problems, mainly a persistent cough that is resistant to treatment. He has been on several courses of [REDACTED] [REDACTED] While these treatments provide the Respondent with temporary relief, he continues to get frequent exacerbations. A pulmonologist, who manages the Respondent's care, has diagnosed him with [REDACTED], which is [REDACTED] [REDACTED] The pulmonologist has linked the disease with "9/11 exposure."

Stern testified that the Respondent received treatment from his office twice during the period between November 2009 and March 2010. At some point in November 2009, the Respondent saw Stern about a sinus infection. Due to the nature of the Respondent's condition, Stern looked in his nose. Stern found no signs that would be expected from somebody who was a chronic user of cocaine. Specifically, the

Respondent had no nasal or septal ulcerations, his blood pressure and pulse were normal, and he did not seem agitated or sweaty. On March 1, 2010, the Respondent returned to Stern's office, this time seeing one of Stern's colleagues with his normal upper respiratory issues. At the March 2010 doctor's visit, the Respondent was treated with [REDACTED]. Stern has reviewed his colleague's notes about this visit and saw no indication of anything abnormal in the physical examination of the Respondent. Stern confirmed that at no point did he ever witness any indication of any sort of illegal drug use by the Respondent. To this day, the Respondent sees both Stern and the pulmonologist on an as-needed basis, and he takes [REDACTED] fairly regularly as a maintenance medication to control the symptoms.

On cross-examination, Stern confirmed that the Respondent has never been prescribed cocaine. Stern conceded that he does not live with the Respondent and is not with him at all times. He explained that he considers chronic drug use to be a period of drug use at least months in duration. He is not a toxicologist and does not have any expertise in workplace hair testing.

The Department's Case

The Department recalled Lieutenant Erin Hughes as a rebuttal witness.

Lieutenant Erin Hughes Recalled

On redirect examination, Hughes testified that she was a supervisor in the Drug Screening Unit in March 2010, and she is familiar with the way that the office was arranged at that time. Upon review of four photographs of the office taken by the

Assistant Department Advocate in May 2011, Hughes testified that the arrangement of the office was the same in March 2010. She explained that the first photograph (DX 5A) shows the waiting area where members of the service sign in and wait to be called for sample collection. The next three photographs show the cutting room from different perspectives. Hughes testified that the cutting room is the only room in the unit where sample collection takes place. A photograph identified as DX 5B shows two tables. Hughes explained that while both of these tables may be used for collection purposes, at the time that the picture was taken one of the tables was being used for storage. On that table rested boxes of testing supplies, such as requisition forms, cups, and scissors. According to Hughes, it was possible that supplies were also on one of these tables back in March 2010. A photograph identified as DX 5C shows what the cutting room looks like when facing the door, and a photograph identified as DX 5D shows a third collection table that could not be seen in the previous pictures. Hughes explained that this third table has a curtain that may be pulled closed to provide privacy in cases where samples are being collected from more private parts of the body. Next to the table is a metal box. Hughes explained that hair samples are locked in this box, and the box is opened only at the end of the day, when all the day's samples are accounted for and packaged for shipping.

On the matter of urinalysis, Hughes testified that the sample donor pours his own urine from the collection cup into the testing vials. The member of the service who is supervising the urine collection, thus, never touches the urine.

On recross-examination, Hughes conceded that she does not specifically recall how the office looked on March 9, 2010. Her testimony regarding the arrangement of the

office was just a general recollection of how the office appeared around that time. For example, she could not know for certain if there were boxes on one of the collection tables on the day in question. Although two members of the service can give samples at the same time, collection would not take place on a table with boxes on it. She explained that the boxes of supplies are kept inside the cutting room so that sample collectors do not have to leave the room for anything. Having the collector step out of room would leave the area compromised for tampering. Hughes reiterated that she was not present when the Respondent's samples were collected, and she did not know if anybody else was giving samples at the same time as the Respondent. She recalled that there were several members of the service called in for testing on the day of the Respondent's collection, and she stated that the waiting area can get crowded at times. Hughes testified that there is no prohibition on the staff carrying their personal cell phones. Hughes has observed Clarke accept personal telephone calls while in the office during his work hours. She is aware that Clarke is engaged in off-duty employment in the restaurant industry. The janitor collects the cutting room garbage at night.

The Respondent's Case

The Respondent Recalled

The Respondent testified that on March 9, 2010, there were numerous people walking in and out of the Drug Screening Unit office. There were at least six staff members working that day, and there were perhaps as many as nine members of the service present in the office to give samples. During the collection of his hair samples, he sat in a swivel chair facing the wall. He was not seated at a table. He reiterated that

Clarke was behind him, and when somebody entered the room he could not see who it was. To his right were boxes, a broom, and more clutter. He reiterated that he did not actually feel his hair being cut. He testified that if his hair was in fact cut, it was cut only once. He was in the chair for just a minute before Clarke brought him over to a table to sign some documents. He did not deposit his samples in the metal box, nor did he observe Clarke place the samples inside the box.

On recross-examination, the Respondent testified that he signed and initialed all three packets at the same time.

FINDINGS AND ANALYSIS

In Specification No. 1, the Respondent is charged that on or about and between December 9, 2009 and March 9, 2010, he possessed a controlled substance, to wit, cocaine. In Specification No.2, he is charged that also during the same aforementioned period of time he ingested the controlled substance, cocaine.

The testimony of the Department's witnesses, described in detail the procedures that were followed in the collection and testing of the Respondent's hair samples. Included in this system of hair testing are procedures designed to insure that the samples of hair taken from a member are taken in a clean environment, segregated from other members, sealed in their own separate packaging, labeled, initialed by the sample taker and signed by the member. The member also certifies by his signature that he witnessed the process. The packaged samples are then sent to the laboratory for analysis.

The Respondent, on March 9, 2010, was called in to the Medical Division for a random drug test. This random call was just that—he was randomly picked for the

screening and not because there was any suspicion that he was using drugs. Clarke, who recognized the Respondent in court, did not recall specific details of the Respondent's collection but, according to his paperwork, he did collect the Respondent's hair sample.

Clarke described, as he does with all members, how he had the Respondent complete and sign a drug screening questionnaire listing his personal information and the prescriptions he had taken within the three months prior to reporting to the Medical Division. The Respondent's fingerprint also appears on the form and he and Clarke signed the document. The Respondent was also assigned an identification number, 5-137-10-XNH, which was unique only to him. The Respondent also signed a certification acknowledging that he is the subject of the test, that his hair was cut close to the skin and that he witnessed the sample collector seal the sample in the envelope.

Clarke described the cutting room as having two tables and made it clear that he personally cleans the cutting room all the time. He primarily cleans the tables and at times the floors and removes garbage from the area. Clarke wears gloves throughout the collection process.

Three hair samples were taken from the Respondent's head. During the cutting, each sample was cut close to the scalp and taken from a different part of his head. Clarke used two hands to cut the hair, one to hold the scissors and the other to hold the hair. Each sample was packaged separately in aluminum foil and placed in a security envelope and sealed. For each of the samples Clarke prepared a Custody and Control Form. This form was signed by both Clarke and the Respondent and the Respondent's identification number also appears on the envelope. After the samples were taken, Clarke would have placed them in a plastic bag and put them in a security locker. Clarke stated that the only

part of the process that the Respondent would not have been able to witness was the actual cutting because that was done with the Respondent's back to Clarke. Everything else was done in front of the Respondent. Clarke also noted that in addition to taking the hair samples, he also collected a urine sample from the Respondent which was subjected to tests for many chemicals, including cocaine metabolites. Clarke stated that the Respondent's hair samples were the only samples that tested positive for those collected on March 9, 2010.

Two of the Respondent's hair samples went to Psychemedics for testing. The Respondent's third hair sample was secured in a locked cabinet at the Sick Desk.

Hughes, a supervisor in the drug screening unit during the March 9, 2010 period told this Court that the two samples that were sent to Psychemedics came back with positive results for cocaine. She then met with the Respondent on July 7, 2010 and verified his identification by having him confirm that it was his signature and identification number on the drug screening paperwork. As the Respondent looked on, she retrieved the third sample from the locked cabinet and, at the request of the Respondent, sent that sample to Quest, a state-certified laboratory. Like the first two samples, the third sample also came back from Quest positive for cocaine.

Hughes described the rooms where the samples were taken pointing out that the samples were taken at one of the tables that are located in the room. She also pointed out that there were boxes of supplies in the room that pertained to the work that was carried out there—scissors, cups, and requisition forms. The supplies are at the location because they don't want the officers taking samples to leave the room which would create the possibility of have the samples compromised.

She described how the samples are stored in a locked box and the box is not opened until the samples are packaged for shipment. She stated that she was not present in the room when the Respondent's hair sample was taken. She did recall that on that date that there were several members waiting to have their hair cut that day and that the waiting room can get pretty crowded. She also stated that there could be two collections going on at the same time.

According to the credible testimony of Ghaffar, Psychemedics is licensed in the state of New York and has been performing hair testing since 1987. She informed this Court that when drugs are ingested it enters into the bloodstream that feed hair follicles and ultimately gets trapped in a person's hair. Basically, hair grows about a half-inch per month and therefore acts as a timeline by indicating when the drug was ingested.

The testing of hair samples, including the Respondent's, is not a simple process. First, the envelopes containing the samples were inspected to make sure they are still intact and the chain of custody was not affected. One of the samples was placed in storage and part of the other sample was given an initial screening. The initial screening for the Respondent's hair sample came back with a positive result for cocaine. A second portion of the same sample was then put through an extensive wash procedure lasting three hours and 45 minutes to remove any external contamination of the hair. After the washing, his hair was analyzed and confirmed to be positive for cocaine. The second sample was then put through another round of extensive washing and analysis and the results was that both samples tested positive for cocaine.

It is only when the positive results for cocaine is at or above the 5 nanograms (ng) of cocaine per ten milligrams of hair that Psychemedics will report the results to the

Department. The Respondent's test results were 23.5 ng (four times higher than cutoff level) and 30.1 ng (six times higher). These tests results indicated that the Respondent took part in multiple ingestions of cocaine. Ghaffar also told this Court the medications that the Respondent was taking would not have resulted in a positive result for cocaine.

Ghaffar also reviewed the Respondent's third hair sample test results that were tested at Quest. That sample came back with a positive result for cocaine at a level of 19.7 ng. She stated that this result was statistically similar to the Psychemedics' results.

Ghaffar concluded from the test results of the Respondent's hair that he ingested cocaine on multiple occasions between January 9, 2010 and March 6, 2010. She pointed out that a single episode of ingestion would not have resulted in the level of concentration of cocaine found in the Respondent's hair.

She also reviewed the tests results for the fourth sample tested by Quest. That sample was given to Quest by the Respondent independently of the first three samples. She stated that the test was run as a pre-employment test and not as a follow-up test. The difference between the two categories is that pre-employment tests, unlike follow-up tests, take cutoff levels into consideration. This means that there could have been drugs present but not at a concentration above the cutoff level. While that test came back negative, Ghaffar pointed out that the results do not necessarily indicate that there was no drugs present in the sample; she explained that there may have been concentrations below the cutoff level and, more importantly, six weeks had lapsed between this taking of his hair and the other three samples. The negative results could have been the result of the Respondent getting a haircut and abstaining from cocaine use during that period. Ghaffar concluded that there was no way of knowing whether the fourth sample reflected the

same time period as the first three samples. Nor will it ever be known whether cocaine was present at a level below Quest's threshold level of 3 ng.

As for the Respondent's urine test, the fact that no positive results for cocaine were found indicates that he did not ingest cocaine during the two or three days prior to that sample collection. Hair testing reflects accumulation of drug use several months prior to the tests being conducted.

The Respondent told this Court that when he reported to the Medical Division on March 9, 2010, to give samples, there were numerous people walking in and out of the office. Some were employees and others were there for tests. After filling out paperwork, he was escorted by Clarke into the bathroom to give a urine sample. He described Clarke as having his cell phone earpiece inside his ear and having a loud cell phone conversation while the Respondent urinated in the sample collection cup. He stated that Clarke explained to him that he owned restaurants and was having problems with them. He described Clarke as being distracted. According to the Respondent, when he gave Clarke the sample cup, Clarke accidentally spilled urine on the table.

The Respondent was then brought to another room to have his hair cut. He described the room as unclean, grimy, and cluttered. He sat at a table that contained supplies such as Band-Aids, pens, and highlighters. He sat with his back to Clarke and claimed that before he knew it Clarke told him the collection was done. He never saw or felt Clarke cut his hair. He testified that if his hair was in fact cut, it was cut only once. He stated that Clarke showed him hair that looked like it was stuck to Scotch tape. After Clarke sealed the hair in an envelope, the Respondent initialed it. He further claimed that despite what he saw, he signed or initialed whatever papers that were given to him

because he never had a problem with the test in the past, and he believed there was nothing to worry about. He signed and initialed all three packets at the same time. He said that while he saw a metal box on a table he did not see Clarke put anything in it.

When he learned that he failed the drug test he had to wait a period of time to get the money to submit to a fourth test, which he did on April 30, 2010. When he filled out the paperwork for the test he stated that he may have indicated the reason for the test as "pre-employment" instead of using an "independent test" category because that was not an option on the form. At the testing site, which he described as very clean, the nurse collected three hair samples from him. The samples were then placed in separate packets, which he signed. The samples, which were sent to Quest, came back negative. Other than a document indicating a negative result there was no paperwork detailing the extent of the tests or whether there was cocaine present but below the cutoff point. The Respondent stated that he did not get a haircut or change his hair in any manner between March 9, 2010 and April 30, 2010.

Doctor Stern informed this Court that he is the Respondent's primary care physician. He testified about the Respondent's chronic respiratory problems or [REDACTED] that he suffered from after spending a lot of time at the World Trade Center destruction after the September 11, 2001 bombing. He treated the Respondent with [REDACTED] which gave temporary relief to the Respondent. Stern stated that at no time during his physical examinations of the Respondent did he find any indication of cocaine ingestion. Stern admitted, though, that he did not know what the Respondent did when he was not in his office and he is not a toxicologist and therefore could not determine if there was drug use by the Respondent under those circumstances.

Based on the evidence presented at this trial, this Court finds that the Respondent's hair was cut, packaged and sealed by the Department under a relatively clean environment and sent to Psychedics and then to Quest with the chain of custody intact. His three hair samples were then tested under a series of professional testing and handling by both of the laboratories' personnel, and the results of those tests found that his samples contained levels of four and six times above the cutoff level for cocaine.

The Respondent attempted to portray the testing facilities as some grungy room that could easily have caused his hair to be contaminated with other hair. He also tried to portray that Clarke, who he claimed was not paying attention to what he was doing, could have easily got his hair mixed up with some other contaminated hair because the Respondent did remember him cutting it or seeing him packaging it once it was cut. This Court does not see how Clarke, who has taken thousands of hair samples, would have brought the Respondent into the room, sat him down in the chair and then failed to take his hair samples. He would then have had the Respondent sign packets with something other than the Respondent's hair. This Court is not convinced of any of these allegations. The Respondent was present in the cutting room, had his hair cut in three batches and each batch was placed in its own package, sealed and signed by Clarke and the Respondent.

If the cutting event was as outrageous as the Respondent claims, then he would have had to have made a credible complaint of irregularities at the time of the sample taking. He did not do so and even signed his name under the certification attesting to the fact that he witnessed the entire event. It was only after his tests came back positive for cocaine that he alleged the improper procedure. Under the circumstances, his allegations

cannot be taken as credible defense against the scientific evidence of the high levels of cocaine found in his hair samples. Those high levels show that he had to be a multiple user of the drug for period of time.

While he did submit a fourth sample for testing, there was no evidence to show that he did not cut his hair after the March 9 samples were taken, and the fourth test was not conclusive as to whether there was an amount of the drug below the cutoff level.

Furthermore, the Respondent having his urine tested for drugs during the same period of his hair tests is of little value to this Court because, at best, the urine test only shows that the Respondent did not use drugs for 72 hours prior to collection.

Based on the forgoing, I find the Respondent Guilty as charged.

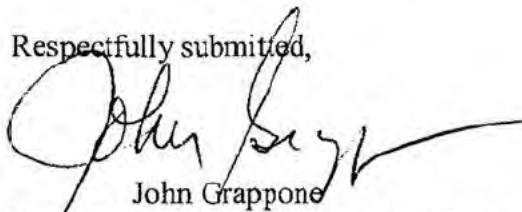
PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). The Respondent was appointed to the Department on August 30, 1993. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent was found Guilty of wrongfully possessing, ingesting and testing positive for cocaine during a random drug test. The Department has a strict no tolerance for drug use by its member as evidenced by Disciplinary Case No. 81240/05, where a uniformed member of the Department was dismissed for failing a drug test that yielded positive results for cocaine.

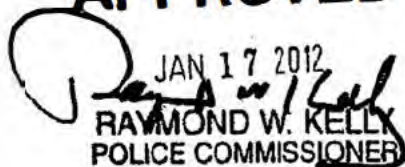
Accordingly, it is recommended that the Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



John Grappone
Assistant Deputy Commissioner Trials

APPROVED



JAN 17 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

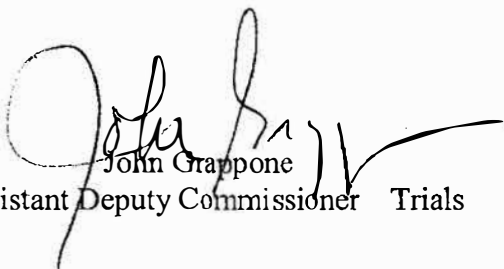
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE CHRISTOPHER JONES
TAX REGISTRY NO. 904220
DISCIPLINARY CASE NO. 86365/10

The Respondent received an overall rating of 4.5 "Highly Competent," on his last four annual performance evaluations. The Respondent has been awarded three Excellent Police Duty and one Meritorious Police Duty medals.

The Respondent has no prior formal disciplinary record.

For your consideration.


John Grappone
Assistant Deputy Commissioner Trials